



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

November 10, 2011

Advanced copy via facsimile: (907) 272-9586

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Linda Johnson, Esq.
Clapp, Peterson, Tiemessen, Thorsness & Johnson LLC
711 H Street, Suite 620
Anchorage, AK 99501

RE: MUR 6403
Alaskans Standing Together, *et al.*

Dear Ms. Johnson:

On November 1, 2011, the Federal Election Commission reviewed the allegations in your complaint dated October 20, 2010, and found that on the basis of the information provided in your complaint, and information provided by respondents, there is no reason to believe Aleut Corporation, Bering Straits Native Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Alaska Corporation, Cook Inlet Region, Inc., Doyon, Limited, Koniag, Inc., and Sealaska Corporation violated 2 U.S.C. § 441c(a)(1), there is no reason to believe Jason Moore violated 2 U.S.C. § 441c(a)(2), and no reason to believe Senator Lisa Murkowski and Lisa Murkowski for U.S. Senate Committee and Joseph M. Schierhorn, in his official capacity as treasurer, violated the Federal Election Campaign Act of 1971, as amended ("the Act"). In addition, the Commission has determined to exercise its prosecutorial discretion and dismiss the allegations that Arctic Slope Regional Corporation, Ahtna, Inc., and NANA Regional Corporation, Inc. violated 2 U.S.C. § 441c(a)(1), and that Alaskans Standing Together and Barbara Donatelli, in her official capacity as treasurer, violated 2 U.S.C. § 441c(a)(2), pursuant to *Hackler v. Chauey*, 470 U.S. 821 (1985). Accordingly, on November 1, 2011, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analyses, which more fully explain the Commission's findings are enclosed.

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MUR 6403 (Alaskans Standing Together, *et al.*)
Letter to Ms. Johnson, Esq.
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The Act allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

Sincerely,

Anthony Herman
General Counsel



BY: Susan L. Lebeaux
Assistant General Counsel

Enclosures
Factual and Legal Analyses (6)

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1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
3

4 **RESPONDENT: Jason Moore**

MUR 6403

5
6 **I. BACKGROUND**
7

8 This matter was generated by a complaint filed with the Federal Election
9 Commission by the Joe Miller for U.S. Senate campaign, by Linda Johnson, Member.
10 *See* 2 U.S.C. § 437g(a)(1). Complainant alleges that Alaskans Standing Together and
11 Barbara Donatelli, in her official capacity as treasurer (“AST”), a political action
12 committee that has made independent expenditures regarding the 2010 U.S. Senate
13 general election in Alaska, and its spokesperson, Jason Moore, knowingly and willfully
14 violated 2 U.S.C. § 441c(a)(2) of the Federal Election Campaign Act of 1971, as
15 amended (“the Act”), by soliciting and accepting \$805,000 in contributions from alleged
16 government contractor corporations. Respondent Moore denies the allegations in the
17 complaint.

18 For the reasons set forth more fully below, the Commission has determined to
19 find no reason to believe that Jason Moore violated 2 U.S.C. § 441c(a)(2).

20 **II. FACTUAL AND LEGAL ANALYSIS**

21 AST, an independent-expenditure-only political committee, registered with the
22 Commission on September 23, 2010. According to AST’s Statement of Organization, it
23 is a political action committee that supports/opposes more than one Federal candidate and
24 is not a separate segregated fund or party committee.

25 The complaint alleges that AST, through its spokesperson Jason Moore,
26 knowingly and willfully solicited and accepted \$805,000 in contributions from

1 government contractors in violation of 2 U.S.C. § 441c(a)(2) for the purpose of funding
2 independent expenditures that supported Alaska Senator Lisa Murkowski and opposed
3 Joe Miller's candidacy in Alaska's 2010 U.S. Senate general election.¹ Joe Miller won
4 the Republican nomination for Alaska's 2010 Senate seat in the primary election, but lost
5 the general election to incumbent Republican Senator Lisa Murkowski, who ran as a
6 write-in candidate. The complaint alleges that AST is a "front group" for Senator
7 Murkowski, and the alleged government contractors that made contributions to AST
8 obtained federal contracts through "earmarks" from Senator Murkowski.

9 Jason Moore, AST's spokesman, filed a response stating that he did not operate
10 AST at any time; rather, his position was that of an employee of MSI Communications,
11 Inc., a vendor providing marketing and media strategy services to AST.

12 The complaint's general allegations that Jason Moore solicited contributions to
13 AST from the Respondents or that he had actual authority with regard to AST, are
14 sufficiently rebutted by the specific denial in Mr. Moore's response and affidavit.
15 According to Mr. Moore, he was an employee of a vendor to AST, MSI
16 Communications, a media strategist and account executive, and he was engaged by AST
17 as a spokesperson in connection with activities to support Senator Murkowski and oppose
18 Mr. Miller in the U.S. Senate race. Mr. Moore's affidavit specifically denies that he was
19 at any time an operator or employee of AST, and states that he did not have any authority

¹ The entities alleged to be government contractors in MUR 6403 are all corporations; the constitutionality of 2 U.S.C. § 441c as applied to individuals is currently the subject of litigation. See *Wagner v. FEC*, No. 11-CV-1841 (D. D.C. filed Oct. 19, 2011).

1 to direct the actions of AST or that he solicited contributions on AST's behalf. We have
2 no information to the contrary.

3 Therefore, there is no reason to believe that Jason Moore violated 2 U.S.C.

4 § 441c(a)(2).

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Lisa Murkowski for U.S. Senate and **MUR 6403**
Joseph M. Schierhorn, in his official capacity as treasurer
Senator Lisa Murkowski

I. BACKGROUND

This matter was generated by a complaint filed with the Federal Election Commission by the Joe Miller for U.S. Senate campaign, by Linda Johnson, Member. See 2 U.S.C. § 437g(a)(1). Complainant alleges that Alaskans Standing Together and Barbara Donatelli, in her official capacity as treasurer ("AST"), a political action committee that has made independent expenditures regarding the 2010 U.S. Senate general election in Alaska, and AST's spokesperson, Jason Moore, knowingly and willfully violated 2 U.S.C. § 441c(a)(2) by soliciting and accepting \$805,000 in contributions from the Respondent corporations, which the Complainant alleges are government contractors.¹ The Complainant further alleges that Lisa Murkowski for U.S. Senate and Joseph M. Schierhorn, in his official capacity as treasurer ("the Murkowski Committee") and Alaska Senator Lisa Murkowski knowingly and willfully violated the Federal Election Campaign Act of 1971, as amended ("the Act"), because Senator Murkowski was "the direct beneficiary of these illegally donated funds..." and AST "g[a]ve federal money to fund Lisa Murkowski's senatorial campaign." Respondents Senator Lisa Murkowski, and the Murkowski Committee, deny the allegations of the complaint.

¹ The Respondent corporations are: Ahtna, Inc., Aleut Corporation, Arctic Slope Regional Corporation, Bering Straits Native Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Alaska Corporation, Cook Inlet Region, Inc., Doyon, Limited, Koniag, Inc., NANA Regional Corporation, Inc., and Sealaska Corporation.

For the reasons set forth below, the Commission has determined to find no reason to believe that Lisa Murkowski for U.S. Senate and Joseph M. Schierhorn, in his official capacity as treasurer, and Senator Lisa Murkowski violated the Act or the Commission's regulations.

II. FACTUAL AND LEGAL ANALYSIS

AST, an independent-expenditure-only political committee, registered with the Commission on September 23, 2010. According to AST's Statement of Organization, it is a political action committee that supports/opposes more than one Federal candidate and is not a separate segregated fund or party committee.

The complaint alleges that AST knowingly and willfully solicited and accepted \$805,000 in contributions from government contractors in violation of 2 U.S.C. § 441c(a)(2) for the purpose of funding independent expenditures that supported Lisa Murkowski and opposed Joe Miller's candidacy in Alaska's 2010 U.S. Senate general election.² Joe Miller won the Republican nomination for Alaska's 2010 Senate seat in the primary election, but lost the general election to incumbent Republican Senator Lisa Murkowski, who ran as a write-in candidate. The complaint alleges that AST is a "front group" for Senator Murkowski, and that the alleged government contractors that made contributions to AST obtained federal contracts through "earmarks" from Senator Murkowski.

² The entities alleged to be government contractors in MUR 6403 are all corporations; the constitutionality of 2 U.S.C. § 441c as applied to individuals is currently the subject of litigation. See *Wagner v. FEC*, No. 11-CV-1841 (D. D.C. filed Oct. 19, 2011).

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1 Senator Murkowski and her committee submitted a joint response denying any
2 connection to AST or that any of AST's funds were donated to or received by her
3 principal campaign committee.

4 There is no available information to support the complaint's general allegations
5 that AST is a "front group" for Senator Murkowski or that the alleged government
6 contractors received contracts that were the result of "earmarks" from her. The
7 Murkowski Response specifically denies these allegations. Further, the screenshot of
8 AST's "About Us" page from its website, which Complainant attaches to the complaint,
9 specifically states AST "is not affiliated in any way with the Lisa Murkowski Campaign."
10 According to the disclosure reports the Murkowski Committee filed with the
11 Commission, that committee did not receive any contributions from AST. Moreover,
12 there is no available information indicating that AST's expenditures in connection with
13 the 2010 general election for Alaska's Senate seat were coordinated with Senator
14 Murkowski or her committee.

15 Therefore, there is no reason to believe that Lisa Murkowski for U.S. Senate and
16 Joseph M. Schierhorn, in his official capacity as treasurer, and Senator Lisa Murkowski,
17 violated the Act.

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1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
3

4 **RESPONDENTS:** Ahtna, Inc.
5 NANA Regional Corporation, Inc.
6

MUR 6403

7 **I. BACKGROUND**

8 This matter was generated by a complaint filed with the Federal Election Commission by
9 the Joe Miller for U.S. Senate campaign, by Linda Johnson, Member. See 2 U.S.C. § 437g(a)(1).
10 Complainant alleges that Ahtna, Inc. and NANA Regional Corporation, Inc. ("NANA
11 Regional") are government contractors that knowingly and willfully violated 2 U.S.C.
12 § 441c(a)(1) by making contributions to Alaskans Standing Together and Barbara Donatelli, in
13 her official capacity as treasurer ("AST"), a political action committee that made independent
14 expenditures to influence the 2010 U.S. Senate general election in Alaska. Ahtna and NANA
15 Regional deny the allegations, stating that (1) the contributions made to AST were permissible
16 because they are not government contractors as defined by the Act and the Commission's
17 regulations; (2) Ahtna and NANA Regional were exercising their First Amendment speech rights
18 when they made independent expenditures by contributing to AST, an independent-expenditure-
19 only political committee; and (3) in the context of independent spending, the Act at 2 U.S.C.
20 § 441c and the Commission's regulation at 11 C.F.R. § 115.2, which prohibit government
21 contractors' contributions, are contrary to *Citizens United v. Federal Election Commission*, 130
22 S. Ct. 876 (2010) ("*Citizens United*"), and *SpeechNow.org. v. Federal Election Commission*, 599
23 F.3d 686 (D.C. Cir. 2010) ("*SpeechNow*").

24 For the reasons set forth below, the Commission has determined to exercise its
25 prosecutorial discretion and dismiss the allegations that Ahtna, Inc. and NANA Regional

Corporation, Inc. violated 2 U.S.C. § 441c(a)(1). *Heckler v. Chaney*, 470 U.S. 821 (1985).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

AST, an independent-expenditure-only political committee, registered with the Commission on September 23, 2010. According to AST's Statement of Organization, it is a political action committee that supports/opposes more than one Federal candidate and is not a separate segregated fund or party committee. AST's disclosure reports filed with the Commission show that in 2010, it made independent expenditures that supported Alaska Senator Lisa Murkowski and opposed Joe Miller's candidacy in Alaska's 2010 U.S. Senate general election. Joe Miller won the Republican nomination for Alaska's 2010 Senate seat in the primary election, but lost the general election to incumbent Republican Senator Lisa Murkowski, who ran as a write-in candidate. The complaint alleges that AST is a "front group" for Senator Murkowski, and that Ahtna and NANA Regional, which made contributions to AST, obtained federal contracts through "earmarks" from Senator Murkowski.

Ahtna and NANA Regional are known as Alaska Native Corporations ("ANCs") because they were formed pursuant to the Alaska Native Claims Settlement Act of 1971, a federal law that extinguished aboriginal claims within the State of Alaska. The Commission has opined that ANCs are not "organized by authority of any law of Congress" for purposes of 2 U.S.C. § 441b(a)'s prohibitions. *See* Advisory Opinion

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1 1982-28 (Sealaska). Ahtna and NANA Regional wholly own subsidiaries that are federal
2 government contractors.

3 On September 28, 2010, Ahtna, Inc. made a \$50,000 contribution to AST, and
4 NANA Regional made a \$100,000 contribution to AST. Each of these ANCs has
5 separate lease agreements with the federal government to supply either office space or
6 land. Ahtna leases office space to the federal government at the rate of \$750 a month, or
7 \$9,000 a year, and NANA Regional leases land to the U.S. Federal Aviation
8 Administration at the rate of \$400 a year.

9 Ahtna's lease agreement with the federal government is dated October 29, 2010;
10 however, negotiations between the General Services Administration and Ahtna regarding
11 the lease terms began in May 2010, and government personnel began using the space in
12 August 2010. According to the lease agreement, Ahtna is to provide the United States
13 government with 250 square feet of office space for occupancy not later than September
14 1, 2010, for a term of 5 years. In addition, Ahtna is to provide the federal government
15 with the following services and utilities related to the use of the office space: heat,
16 electricity, power (special equipment), water, snow removal, trash removal, chilled
17 drinking water, air conditioning, toilet supplies, janitorial services and supplies, window
18 washing, carpet cleaning, initial replacement lamps, tubes and ballasts, and painting.

19 Ahtna also states that it is a recipient of a federally-funded grant in the form of a
20 self-determination agreement whereby Ahtna is to oversee a survey near certain Alaska
21 villages for the benefit of Alaskan Natives in the area. Ahtna maintains that this type of

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1 federal grant is not covered by the prohibitions of 2 U.S.C. § 441c, and cites to Advisory
2 Opinion 1993-12 (Mississippi Band of Choctaw Indians) in support of its position.

3 NANA Regional entered into a land lease with the Federal Aviation
4 Administration ("FAA") that began on October 1, 2007, and runs through September 30,
5 2026, for the FAA's use of 6.3976 acres off the Buckland Airport in Buckland, Alaska.
6 The federal government uses the land for construction, maintenance, and operation of a
7 non-directional beacon and related equipment. The land lease agreement also grants the
8 FAA access to the leased property from NANA Regional's adjoining lands. Further,
9 under the land lease, the government has the right to maintain the land parcel, including
10 grading, conditioning, and installing drainage facilities; and the right to make alterations
11 to the parcel, including installing fixtures, structures or signs. Anything the FAA attaches
12 to the premises remains the property of the federal government.

13 According to Ahtna and NANA Regional, the office and land lease arrangements
14 exist out of necessity because the government has no other options in the area, and the
15 amounts they receive from the government are *de minimis*. Ahtna and NANA Regional
16 also state that they relied on legal advice that the contributions were permissible. Ahtna
17 and NANA Regional both maintain that the corporate officers involved in the
18 discussions, meetings, and communications relating to the contributions to AST were not
19 aware of the existence of the lease agreements at the time of their contributions to AST.
20 NANA Regional states that its contract with the government provides that the revenues
21 from its lease arrangement flow to NANA Development Corporation, a legal entity
22 separate from NANA Regional. Other than these lease arrangements, neither Ahtna nor

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1 NANA Regional has contracts with the federal government. Although their subsidiaries
2 are government contractors, they are separate and distinct legal entities, and each parent
3 company had sufficient income to make its contribution with funds from sources other
4 than their government contractor subsidiaries.

5 Ahtna and NANA Regional request that the Commission exercise its discretion
6 not to pursue the alleged 2 U.S.C. § 441c violations arguing that although both
7 corporations lease real property to the federal government, the statute attaches, in relevant
8 part, to the selling of any land or buildings. They also request that AO 1984-53 (National
9 Association of Realtors) not be applied in this context as it represents a “questionable
10 leap in statutory construction.”

11 In addition, Ahtna and NANA Regional argue that when they made their
12 respective contributions to AST for the purpose of funding independent expenditures,
13 they were exercising their First Amendment speech rights. According to these
14 respondents, given that their donations were not “direct or indirect contributions to
15 candidates,” the Commission should apply the holdings in *Citizen United* and *SpeechNow*
16 to their contributions supporting an independent-expenditure-only political action
17 committee. Last, Ahtna and NANA Regional argue that the statute uses only the term
18 “contribution,” and while the regulation at 11 C.F.R. § 115.2 includes the term
19 “expenditure,” the Commission should interpret § 441c to reach only contributions, in
20 light of the holdings in *Citizens United* and *SpeechNow*.

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B. Legal Analysis

The Act and the Commission's regulations prohibit government contractors from making, directly or indirectly, any contribution or expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure to any political party, committee or candidate for public office or to any person for any political purpose. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.2(a) and (b).¹ A "federal contractor" is defined in terms of the substance of the contract and the source of funds for payment of performance of the contract. 2 U.S.C. § 441c; 11 C.F.R. § 115.1. With respect to the substance of the contract, it includes the rendering of personal services, the furnishing of materials, supplies, or equipment, or the selling of land or buildings. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(a)(1); *see* Advisory Opinion 1984-53 (National Association of Realtors) (lessor of land to federal agency is also considered a government contractor). The prohibition applies if payment to the contractor is to be made in whole or in part from funds appropriated by Congress. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(a)(2). The prohibition extends for the period of time between the earlier of the commencement of negotiations or when requests for proposals are sent out, and the later of the completion of performance or the termination of negotiations for such contract. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(b). The Act and the Commission's regulations further prohibit any person from knowingly soliciting any contributions from

¹ The entities alleged to be government contractors in MUR 6403 are all corporations; the constitutionality of 2 U.S.C. § 441c as applied to individuals is currently the subject of litigation. *See Wagner v. FEC*, No. 11-CV-1841 (D. D.C. filed Oct. 19, 2011).

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1 government contractors who are in negotiations for a federal government contract or
2 during the performance of their contract. 2 U.S.C. § 441c(a)(2) and 11 C.F.R. § 115.2(c).

3 When determining whether a committee has received, or that an entity has made,
4 a contribution in violation of 2 U.S.C. § 441c, the Commission looks first to whether the
5 entity met the statutory and regulatory definition of government contractor at the time the
6 contribution was made. *See* MUR 6300 (Gen X Strategies); MUR 5666 (MZM); MUR
7 5645 (Highmark); MUR 4901 (Rust Environmental); and MUR 4297 (Ortho
8 Pharmaceutical). In the case of a parent company contributor, if it can demonstrate that it
9 is, in fact, a separate and distinct legal entity from its government contractor subsidiaries,
10 and that it had sufficient funds to make the contributions from non-subsidiary income,
11 then the prohibition on contributions by government contractors would not extend to the
12 parent company. *See* Advisory Opinion 2005-01 (Mississippi Band of Choctaw Indians)
13 (the government contractor status of a tribal corporation, a distinct and separate legal
14 entity from the tribe, does not prohibit the tribe from making contributions to federal
15 candidates, political parties, and political committees as long as the tribe does not use
16 revenues from tribal corporation to make contributions), *citing* Advisory Opinion 1999-
17 32 (Tohono O'odham Nation) (the commercial activity of the Indian tribe's utility
18 authority as a government contractor treated as separate from the tribe and its political
19 activities).

20 Ahtna and NANA Regional each have a lease with the federal government to
21 supply either office space or land to a federal agency. Ahtna leases office space to the
22 federal government, and provides services, supplies, and utilities under that lease

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1 agreement, at the rate of \$9,000 a year. NANA Regional leases land to the U.S. Federal
2 Aviation Administration with rights including maintaining, making alternations to,
3 attaching fixtures, and building structures or fixtures thereon, at the rate of \$400 a year
4 for a term of 19 years. Based on the available information, the federal agencies make the
5 rental payments to these ANCs with funds appropriated by Congress. *See* 11 C.F.R.
6 § 115.1(a)(2).

7 In AO 1984-53 (National Association of Realtors), the Commission concluded
8 that a lessor of real property to the federal government would be covered by the
9 prohibitions of 2 U.S.C. § 441c and, therefore, would be prohibited from making
10 contributions to federal candidates and committees. 11 C.F.R. § 115.2. The Commission
11 viewed the lease of real property as a contract for "selling any land or buildings" within
12 the meaning of 2 U.S.C. § 441c and 11 C.F.R. § 115.1(a)(1)(iii) because a lease of real
13 property creates an estate in the tenant for a term of years, in effect, representing the sale
14 of an interest in land or buildings, with the rent as the purchase price, and creates a
15 continuing relationship between the lessor and lessee supporting the application of the
16 statutory prohibition to a lease agreement. *See* AO 1984-53. In addition, the
17 Commission noted that lease agreements usually contain explicit contractual provisions
18 regarding repairs, furnishing of utilities, and other matters, and that such provisions can
19 be viewed as contracts for the rendition of personal services or for the furnishing of
20 material supplies, or equipment. *Id.*; 11 C.F.R. § 115.1(a)(1)(i) and (ii).

21 Ahtna's office space lease agreement with the federal government not only leases
22 the rental space, but includes explicit provisions for this parent company to make repairs,

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1 and provide utilities, supplies, and services, such as snow removal and janitorial services,
2 to the federal agency renting the space. NANA Regional's land lease agreement is for a
3 term of 19 years, creating a continuing relationship between NANA Regional and the
4 federal agency for a significant length of time.

5 Given these facts, Ahtna and NANA Regional are government contractors within
6 the meaning of the Act and the Commission's regulations. See 2 U.S.C. § 441c(a)(1) and
7 11 C.F.R. § 115.1(a); see also AO 1984-53. The analysis in AO 1984-53 is sound, it has
8 been a source of guidance for 27 years without any intervening precedent to the contrary,
9 and it applies precisely to the facts of this matter. See also Advisory Opinion 2008-11
10 (Brown) (citing AO 1984-53 in analysis of 2 U.S.C. § 441c scenario). As federal
11 government contractors, Ahtna and NANA Regional are prohibited from making
12 contributions toward any "political party, committee or candidate for public office or to
13 any person for any political purpose or use." 2 U.S.C. § 441c(a)(1).²

14 In their joint response, Ahtna and NANA Regional argue that their donations to
15 AST were for the purpose of making independent expenditures, and since the statute uses
16 only the term "contribution," the Commission should interpret § 441c to reach only
17 contributions, in light of the holdings in *Citizens United* and *SpeechNow*, despite the
18 regulation at 11 C.F.R. § 115.2 including the term "expenditure." However, these
19 Respondents' activity fell squarely within the statute's prohibitions because they made
20 contributions to AST; they themselves made no expenditures.

² The federally-funded grant which Ahtna receives to oversee a survey near certain Alaska villages for the benefit of Alaskan Natives in the area, however, appears to be outside of the definition of a federal contract as set forth by the Act and the Commission's regulations. 11 C.F.R. § 115.1(c); see AO 1993-12 (Mississippi Band of Choctaw Indians).

1 However, even though Ahtna and NANA Regional appear to meet the definition
2 of government contractors under the Act and the Commission's regulations, given the
3 unique facts in this matter, the Commission has determined to exercise its prosecutorial
4 discretion and dismiss the allegations as to them. *Heckler v. Chaney*, 470 U.S. 821
5 (1985). Ahtna and NANA Regional do not ordinarily enter into contracts with the federal
6 government, and the executive officers who made the decision to contribute to AST have
7 avowed they were not even aware of the existence of these lease arrangements until after
8 the complaint was filed.³ Neither of the companies sought the leases in question.
9 Rather, each company was approached by federal agencies to lease certain office space
10 and land space only because the government had no other options in the area, and it
11 appears that the lease arrangements primarily benefit the public, especially the lease for
12 the FAA beacon.⁴ Moreover, the amounts paid by the federal government for the lease
13 agreements are relatively small taking into consideration these ANCs' other income and
14 assets.⁵

15 Therefore, the Commission has determined to exercise its prosecutorial discretion
16 and dismiss the allegations that Ahtna, Inc. and NANA Regional Corporation violated
17 2 U.S.C. § 441c(a)(1). *Hackler v. Chaney*, 470 U.S. 821, 831 (1985).

³ Ahtna and NANA Joint Response at 3-5; Roy Tansy, Jr., Affidavit at ¶¶ 4, 5; Marie N. Greene Affidavit at ¶¶ 3,4; and David Fehrenbach Affidavit at ¶ 4.

⁴ Ahtna and NANA Joint Response at 3-5; Jeffrey Nelson Affidavit at ¶ 3; Kathryn Martin Affidavit at ¶¶ 5, 6.

⁵ Ahtna and NANA Response at 3-5; Jeffrey Nelson Affidavit at ¶ 4; Kevin Thomas Affidavit at ¶¶ 3,4; David Fehrenbach Affidavit at ¶¶ 7,8.

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1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
3

4 **RESPONDENT: Arctic Slope Regional Corporation**

MUR 6403

5
6 **I. BACKGROUND**
7

8 This matter was generated by a complaint filed with the Federal Election Commission by
9 the Joe Miller for U.S. Senate campaign, by Linda Johnson, Member. See 2 U.S.C. § 437g(a)(1).
10 Complainant alleges that Arctic Slope Regional Corporation ("Arctic Slope") is a government
11 contractor that knowingly and willfully violated 2 U.S.C. § 441c(a)(1) by making contributions
12 to Alaskans Standing Together and Barbara Donatelli, in her official capacity as treasurer
13 ("AST"), a political action committee that made independent expenditures to influence the 2010
14 U.S. Senate general election in Alaska. Arctic Slope denies the allegations, stating that (1) the
15 contributions made to AST were permissible because it is not a government contractor as defined
16 by Federal Election Campaign Act of 1971, as amended ("the Act"), and the Commission's
17 regulations; (2) Arctic Slope was exercising its First Amendment speech rights when it made
18 independent expenditures by contributing to AST, an independent-expenditure-only political
19 committee; and (3) in the context of independent spending, the Act at 2 U.S.C. § 441c and the
20 Commission's regulation at 11 C.F.R. § 115.2, which prohibit government contractors'
21 contributions, are contrary to *Citizens United v. Federal Election Commission*, 130 S. Ct. 876
22 (2010) ("*Citizens United*"), and *SpeechNow.org. v. Federal Election Commission*, 599 F.3d 686
23 (D.C. Cir. 2010) ("*SpeechNow*").

24 For the reasons set forth below, the Commission has determined to exercise its
25 prosecutorial discretion and dismiss the allegations that Arctic Slope Regional
26 Corporation violated 441c(a)(1). *Heckler v. Chaney*, 470 U.S. 821 (1985).

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II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

AST, an independent-expenditure-only political committee, registered with the Commission on September 23, 2010. According to AST's Statement of Organization, it is a political action committee that supports/opposes more than one Federal candidate and is not a separate segregated fund or party committee. AST's disclosure reports filed with the Commission show that in 2010, it made independent expenditures that supported Alaska Senator Lisa Murkowski and opposed Joe Miller's candidacy in Alaska's 2010 U.S. Senate general election. Joe Miller won the Republican nomination for Alaska's 2010 Senate seat in the primary election, but lost the general election to incumbent Republican Senator Lisa Murkowski, who ran as a write-in candidate. The complaint alleges that AST is a "front group" for Senator Murkowski, and that Arctic Slope, which made contributions to AST, obtained federal contracts through "earmarks" from Senator Murkowski.

Arctic Slope is an Alaska Native Corporation ("ANC") because it was formed pursuant to the Alaska Native Claims Settlement Act of 1971, a federal law that extinguished aboriginal claims within the State of Alaska. The Commission has opined that ANCs are not "organized by authority of any law of Congress" for purposes of 2 U.S.C. § 441b(a)'s prohibitions. *See* Advisory Opinion 1982-28 (Sealaska). Arctic Slope wholly owns subsidiaries that are federal government contractors.

Arctic Slope made a \$140,000 contribution to AST on September 30, 2010, and another \$60,000 contribution to AST on October 27, 2010. Arctic Slope has a lease agreement with the federal government to supply office space. Specifically, Arctic Slope

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1 has leased office space to the Transportation Security Administration ("TSA") since 2006
2 and receives \$2,400 each month, or \$28,800 annually, directly from the federal
3 government. According to the lease agreement, Arctic Slope leased approximately 800
4 square feet of office space in Barrow, Alaska, to the United States for a period of time
5 beginning October 1, 2006, for a term of 5 years. Under the terms of the lease
6 agreement, Arctic Slope agreed to provide various services and utilities as part of the
7 rental of the space, including heat, electricity, water, snow removal, toilet supplies,
8 janitorial services and supplies, elevator service, window washing, carpet cleaning, initial
9 and replacement lamps, tubes and ballasts, and painting.

10 Arctic Slope contends that the rental is *de minimis*, the lease is a last resort for
11 TSA, and that it primarily benefits the public. It maintains that the proceeds from this
12 lease arrangement represent 0.0015% of Arctic Slope's gross revenue for 2009.
13 According to Arctic Slope, this lease agreement with the federal government was not
14 discovered by the personnel who decided to make the contribution to AST because the
15 lease was listed under another entity's name in Arctic Slope's records, the person who
16 was primarily responsible for responding to the government's requests concerning the
17 lease is no longer employed by Arctic Slope, and the lease is an isolated arrangement as
18 Arctic Slope does not market itself as a lessor to federal government entities. Arctic
19 Slope submitted an affidavit from a corporate officer stating that, other than this lease,
20 Arctic Slope is not a government contractor, it represents the business interests of the
21 Inupiat Eskimos, and it had approximately \$1.128 billion in revenue during fiscal year
22 2009 that was attributable to activities and operations of Arctic Slope and its subsidiaries
23 that are not related to federal government contracting. The businesses of Arctic Slope

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1 and its subsidiaries include energy services, construction, petroleum refining, aerospace,
2 and tourism operations.

3 In addition, Arctic Slope argues that it is not a government contractor as defined
4 by the Act or the Commission regulations because leases are not types of contractual
5 agreements covered under the statutory or regulatory definitions. Arctic Slope contends
6 that while the Commission opined in Advisory Opinion 1984-53 (National Association of
7 Realtors), that leases equate to sales for purposes of 2 U.S.C. § 441c, the Commission did
8 so "without attempt to account for the exclusion of leases from the test or for possible
9 relevant distinctions between leases and sales." Therefore, Arctic Slope argues that
10 AO 1984-53 should not be applied to its lease agreement with the federal government.

11 Last, Arctic Slope argues that it was exercising its First Amendment speech rights
12 when it made its two contributions to AST for the purpose of making independent
13 expenditures. Arctic Slope relies on *Citizens United* to support its argument that because
14 its underlying activities are incapable of causing corruption or the appearance of
15 corruption, anti-corruption aims are not a "compelling interest" sufficient to validate
16 2 U.S.C. § 441c(a)'s ban on independent speech. Therefore, Arctic Slope argues that the
17 prohibitions in 2 U.S.C. § 441c are not applicable to the facts of this matter.

18 **B. Legal Analysis**

19 The Act and the Commission's regulations prohibit government contractors from
20 making, directly or indirectly, any contribution or expenditure of money or other thing of
21 value, or to promise expressly or impliedly to make any such contribution or expenditure
22 to any political party, committee or candidate for public office or to any person for any

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1 political purpose. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.2(a) and (b).¹ A “federal
2 contractor” is defined in terms of the substance of the contract and the source of funds for
3 payment of performance of the contract. 2 U.S.C. § 441c; 11 C.F.R. § 115.1. With
4 respect to the substance of the contract, it includes the rendering of personal services, the
5 furnishing of materials, supplies, or equipment, or the selling of land or buildings.
6 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(a)(1); *see* Advisory Opinion 1984-53 (National
7 Association of Realtors) (lesser of land to federal agency is also considered a government
8 contractor). The prohibition applies if payment to the contractor is to be made in whole
9 or in part from funds appropriated by Congress. 2 U.S.C. § 441c(a)(1);
10 11 C.F.R. § 115.1(a)(2). The prohibition extends for the period of time between the
11 earlier of the commencement of negotiations or when requests for proposals are sent out,
12 and the later of the completion of performance or the termination of negotiations for such
13 contract. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(b). The Act and the Commission’s
14 regulations further prohibit any person from knowingly soliciting any contributions from
15 government contractors who are in negotiations for a federal government contract or
16 during the performance of their contract. 2 U.S.C. § 441c(a)(2) and 11 C.F.R. § 115.2(c).
17 When determining whether a committee has received, or that an entity has made,
18 a contribution in violation of 2 U.S.C. § 441c, the Commission looks first to whether the
19 entity met the statutory and regulatory definition of government contractor at the time the
20 contribution was made. *See* MUR 6300 (Gen X Strategies); MUR 5666 (MZM); MUR
21 5645 (Highmark); MUR 4901 (Rust Environmental); and MUR 4297 (Ortho

¹ The entities alleged to be government contractors in MUR 6403 are all corporations; the constitutionality of 2 U.S.C. § 441c as applied to individuals is currently the subject of litigation. *See Wagner v. FEC*, No. 11-CV-1841 (D. D.C. filed Oct. 19, 2011).

1 Pharmaceutical). In the case of a parent company contributor, if it can demonstrate that it
2 is, in fact, a separate and distinct legal entity from its government contractor subsidiaries,
3 and that it had sufficient funds to make the contributions from non-subsidiary income,
4 then the prohibition on contributions by government contractors would not extend to the
5 parent company. *See* Advisory Opinion 2005-01 (Mississippi Band of Choctaw Indians)
6 (the government contractor status of a tribal corporation, a distinct and separate legal
7 entity from the tribe, does not prohibit the tribe from making contributions to federal
8 candidates, political parties, and political committees as long as the tribe does not use
9 revenues from tribal corporation to make contributions), *citing* Advisory Opinion 1999-
10 32 (Tohono O'odham Nation) (the commercial activity of the Indian tribe's utility
11 authority as a government contractor treated as separate from the tribe and its political
12 activities).

13 Arctic Slope has a lease with the federal government to supply office space to a
14 federal agency. Arctic Slope leases office space to TSA, provides various services,
15 supplies, and utilities under that lease agreement, and receives \$28,800 a year in direct
16 payment from the federal government. Based on the available information, TSA makes
17 the rental payments to Arctic Slope with funds appropriated by Congress. *See* 11 C.F.R.
18 § 115.1(a)(2).

19 In AO 1984-53 (National Association of Realtors), the Commission concluded
20 that a lessor of real property to the federal government would be covered by the
21 prohibitions of 2 U.S.C. § 441c and, therefore, would be prohibited from making
22 contributions to federal candidates and committees. 11 C.F.R. § 115.2. The Commission
23 viewed the lease of real property as a contract for "selling any land or buildings" within

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1 the meaning of 2 U.S.C. § 441c and 11 C.F.R. § 115.1(a)(1)(iii) because a lease of real
2 property creates an estate in the tenant for a term of years, in effect, representing the sale
3 of an interest in land or buildings, with the rent as the purchase price, and creates a
4 continuing relationship between the lessor and lessee supporting the application of the
5 statutory prohibition to a lease agreement. *See* AO 1984-53. In addition, the
6 Commission noted that lease agreements usually contain explicit contractual provisions
7 regarding repairs, furnishing of utilities, and other matters, and that such provisions can
8 be viewed as contracts for the rendition of personal services or for the furnishing of
9 material supplies, or equipment. *Id.*; 11 C.F.R. § 115.1(a)(1)(i) and (ii).

10 Arctic Slope's office space lease agreement with the federal government not only
11 leases the rental space, but includes explicit provisions for Arctic Slope to make repairs,
12 and provide utilities, supplies, and services, such as snow removal and janitorial services,
13 to the federal agency renting the space.

14 Given these facts, Arctic Slope is a government contractor within the meaning of
15 the Act and the Commission's regulations. *See* 2 U.S.C. § 441c(a)(1) and 11 C.F.R.
16 § 115.1(a); *see also* AO 1984-53. The analysis in AO 1984-53 is sound, it has been a
17 source of guidance for 27 years without any intervening precedent to the contrary, and it
18 applies precisely to the facts of this matter. *See also* Advisory Opinion 2008-11 (Brown)
19 (citing AO 1984-53 in analysis of 2 U.S.C. § 441c scenario). As a federal government
20 contractor, Arctic Slope is prohibited from making contributions toward any "political
21 party, committee or candidate for public office or to any person for any political purpose
22 or use." 2 U.S.C. § 441c(a)(1).

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1 However, even though Arctic Slope appears to meet the definition of government
2 contractors under the Act and the Commission's regulations, given the unique facts in
3 this matter, the Commission has determined to exercise its prosecutorial discretion and
4 dismiss the allegation as to Arctic Slope Regional Corporation. *Heckler v. Chaney*, 470
5 U.S. 821 (1985). Arctic Slope does not ordinarily enter into contracts with the federal
6 government, the executive officer who made the decision to contribute to AST has
7 averred he was not even aware of the existence of its lease arrangement until after the
8 complaint was filed.² Arctic Slope did not seek the lease in question. Rather, Arctic
9 Slope was approached by the TSA to lease certain office space only because the
10 government had no other options in the area, and it appears that the lease arrangement
11 primarily benefits the public.³ Moreover, the amount paid by the federal government for
12 the lease agreement is relatively small taking into consideration Arctic Slope's other
13 income and assets.⁴ Arctic Slope's lease arrangement, at a rate of \$28,800 a year,
14 represented only 0.0015% of Arctic Slope's gross revenue for 2009.⁵

15 Therefore, the Commission has determined to exercise its prosecutorial discretion
16 and dismiss the allegation that Arctic Slope Regional Corporation violated 2 U.S.C.
17 § 441c(a)(1). *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

² Arctic Slope Response at 2-3; Kristin Mellinger Affidavit at ¶¶ 6,7; Clay Contrades Affidavit at ¶¶ 2,4.

³ Arctic Slope Response at 2-3; Kristin Mellinger Affidavit at ¶ 7; Clay Contrades Affidavit at ¶¶ 2, 4.

⁴ Arctic Slope Response at 3; Kristin Mellinger Affidavit at ¶ 7.

⁵ *Id.*

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1 *Election Commission*, 130 S. Ct. 876 (2010) (“*Citizens United*”), and *SpeechNow.org v. Federal*
2 *Election Commission*, 599 F.3d 686 (D.C. Cir. 2010) (“*SpeechNow*”).

3 For the reasons set forth below, the Commission has determined to find no reason
4 to believe that Aleut Corporation, Bering Straits Native Corporation, Bristol Bay Native
5 Corporation, Calista Corporation, Chugach Alaska Corporation, Cook Inlet Region, Inc.,
6 Doyon, Limited, Koniag, Inc., and Sealaska Corporation (“Respondents”) violated
7 2 U.S.C. § 441c(a)(1) because the available information shows that these companies are
8 not government contractors.

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. Factual Background**

11 AST, an independent-expenditure-only political committee, registered with the
12 Commission on September 23, 2010. According to AST’s Statement of Organization, it
13 is a political action committee that supports/opposes more than one Federal candidate and
14 is not a separate segregated fund or party committee. AST’s disclosure reports filed with
15 the Commission show that in 2010, it made independent expenditures that supported
16 Alaska Senator Lisa Murkowski and opposed Joe Miller’s candidacy in Alaska’s 2010
17 U.S. Senate general election. Joe Miller won the Republican nomination for Alaska’s
18 2010 Senate seat in the primary election, but lost the general election to incumbent
19 Republican Senator Lisa Murkowski, who ran as a write-in candidate. The complaint
20 alleges that AST is a “front group” for Senator Murkowski, and that Respondents made
21 contributions to AST obtained federal contracts through “earmarks” from Senator
22 Murkowski.

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1 Respondents are collectively known as Alaska Native Corporations (“ANCs”)
2 because they were formed pursuant to the Alaska Native Claims Settlement Act of 1971,
3 a federal law that extinguished aboriginal claims within the State of Alaska. The
4 Commission has opined that ANCs are not “organized by authority of any law of
5 Congress” for purposes of 2 U.S.C. § 441b(a)’s prohibitions. *See* Advisory Opinion
6 1982-28 (Sealaska). Each is a parent company that wholly owns a number of
7 subsidiaries, some of which are federal government contractors.

8 These nine parent companies filed a joint response (“Aleut, *et al.* Response”)
9 denying that any of them met the statutory and regulatory definitions of government
10 contractor at the time they made their respective donations to AST, and stating that these
11 entities do not hold Federal government contracts. Generally, each of these ANCs
12 represents the business interests of their respective shareholders; their subsidiaries engage
13 in various business activities including communications, construction, aerospace,
14 petroleum, engineering, and tourism. They further argue that their contributions to AST
15 were permissible, even though some of their respective subsidiaries are government
16 contractors, because as parent companies, they are separate and distinct legal entities
17 from their government contractor subsidiaries, and they are able to demonstrate that their
18 revenue is sufficiently large to make these donations from non-subsidiary income.¹

19 The Aleut *et al.* Response alternatively argues that 2 U.S.C. § 441c(a) is
20 unconstitutional to the extent it is read to restrict these respondents’ contributions for the
21 purpose of funding independent expenditures, based on language in *Citizens United*, 130

¹ In addition, both Koniag and Sealaska receive public grants that serve public purposes and do not directly benefit the U.S. government. Koniag also receives funds for a conservation easement, as part of the Exxon Valdez Oil Spill Trustee Council’s habitat restoration efforts.

1 S.Ct. at 910, that independent expenditures do not “lead to, or create the appearance of,
2 *quid pro quo* corruption” regardless of the speaker’s identity, and in the related holding in
3 *SpeechNow*.

4 **B. Legal Analysis**

5 The Act and the Commission’s regulations prohibit government contractors from
6 making, directly or indirectly, any contribution or expenditure of money or other thing of
7 value, or to promise expressly or impliedly to make any such contribution or expenditure
8 to any political party, committee or candidate for public office or to any person for any
9 political purpose. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.2(a) and (b).² A “federal
10 contractor” is defined in terms of the substance of the contract and the source of funds for
11 payment of performance of the contract. 2 U.S.C. § 441c; 11 C.F.R. § 115.1. With
12 respect to the substance of the contract, it includes the rendering of personal services, the
13 furnishing of materials, supplies, or equipment, or the selling of land or buildings.
14 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(a)(1); *see* Advisory Opinion 1984-53 (National
15 Association of Realtors) (lessor of land to federal agency is also considered a government
16 contractor). The prohibition applies if payment to the contractor is to be made in whole
17 or in part from funds appropriated by Congress. 2 U.S.C. § 441c(a)(1);
18 11 C.F.R. § 115.1(a)(2). The prohibition extends for the period of time between the
19 earlier of the commencement of negotiations or when requests for proposals are sent out,
20 and the later of the completion of performance or the termination of negotiations for such
21 contract. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(b). The Act and the Commission’s

² The entities alleged to be government contractors in MUR 6403 are all corporations; the constitutionality of 2 U.S.C. § 441c as applied to individuals is currently the subject of litigation. *See Wagner v. FEC*, No. 11-CV-1841 (D. D.C. filed Oct. 19, 2011).

1 regulations further prohibit any person from knowingly soliciting any contributions from
2 government contractors who are in negotiations for a federal government contract or
3 during the performance of their contract. 2 U.S.C. § 441c(a)(2) and 11 C.F.R. § 115.2(c).

4 When determining whether a committee has received, or that an entity has made,
5 a contribution in violation of 2 U.S.C. § 441c, the Commission looks first to whether the
6 entity met the statutory and regulatory definition of government contractor at the time the
7 contribution was made. See MUR 6300 (Gen X Strategies); MUR 5666 (MZM); MUR
8 5645 (Highmark); MUR 4901 (Rust Environmental); and MUR 4297 (Ortho
9 Pharmaceutical). In the case of a parent company contributor, if it can demonstrate that it
10 is, in fact, a separate and distinct legal entity from its government contractor subsidiaries,
11 and that it had sufficient funds to make the contributions from non-subsidiary income,
12 then the prohibition on contributions by government contractors would not extend to the
13 parent company. See Advisory Opinion 2005-01 (Mississippi Band of Choctaw Indians)
14 (the government contractor status of a tribal corporation, a distinct and separate legal
15 entity from the tribe, does not prohibit the tribe from making contributions to federal
16 candidates, political parties, and political committees as long as the tribe does not use
17 revenues from tribal corporation to make contributions), citing Advisory Opinion 1999-
18 32 (Tohono O'odham Nation) (the commercial activity of the Indian tribe's utility
19 authority as a government contractor treated as separate from the tribe and its political
20 activities).

21 Based on the available information, including affidavits from corporate officers, it
22 appears that Aleut Corporation, Bering Straits Native Corporation, Bristol Bay Native
23 Corporation, Calista Corporation, Chugach Alaska Corporation, Cook Inlet Region, Inc.,

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1 Doyon, Ltd., Koniag, Inc., and Sealaska Corporation have sufficiently demonstrated that
2 as parent companies without contracts with the federal government, they are not
3 government contractors, and therefore their contributions to AST were permissible.
4 Although they each have subsidiaries that hold federal contracts, those subsidiaries are
5 separate and distinct legal entities from them, and the parent companies have sufficiently
6 demonstrated that they made their contributions to AST with revenue from sources other
7 than the federal-contract-holding subsidiaries. Therefore, they are not government
8 contractors as defined by the Act and the Commission's regulations. 2 U.S.C. § 441c;
9 11 C.F.R. § 115.1; *see* AO 2005-01 (Mississippi Band of Choctaw Indians) *citing* AO
10 1999-32 (Tohono O'odham Nation). Further, the parent company ANCs' contributions
11 to AST do not violate the Act's prohibition on corporate contributions in connection with
12 federal elections, 2 U.S.C. § 441b(a), because the contributions to AST, an independent-
13 expenditure-only political action committee, were made for the purpose of making
14 independent expenditures. *See Citizens United*, 130 S. Ct. at 913; AO 2010-11
15 (Commonsense Ten) at 3.³

16 Therefore, there is no reason to believe that Aleut Corporation, Bering Straits
17 Native Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach
18 Alaska Corporation, Cook Inlet Region, Inc., Doyon, Ltd., Koniag, Inc., and Sealaska
19 Corporation violated 2 U.S.C. § 441c(a)(1).

³ As a final note, it appears that Koniag and Sealaska's receipt of the public grants do not make them government contractors. The public grants that Koniag and Sealaska receive from the federal government, *see* footnote 1, *supra*, appear to be outside of the definition of a federal contract as set forth by the Act and the Commission's regulations. 11 C.F.R. § 115.1(c); *see* AO 1993-12 (Mississippi Band of Choctaw Indians) (federal grant for public service activity, which does not directly benefit the U.S. Government, is not a "contract" as defined by 11 C.F.R. § 115.1; note that the part of the opinion's analysis concerning procurement contracts between tribal enterprises and the federal government is superseded by AO 1999-32 (Tohono O'odham Nation)).

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

**RESPONDENT: Alaskans Standing Together and Barbara Donatelli, MUR 6403
in her official capacity as treasurer**

I. BACKGROUND

This matter was generated by a complaint filed with the Federal Election Commission by the Jov Miller for U.S. Senate campaign, by Linda Johnson, Member. See 2 U.S.C. § 437g(a)(1). Complainant alleges that Alaskans Standing Together and Barbara Donatelli, in her official capacity as treasurer ("AST"), a political action committee that has made independent expenditures regarding the 2010 U.S. Senate general election in Alaska, and its spokesperson, Jason Moore, knowingly and willfully violated 2 U.S.C. § 441c(a)(2) of the Federal Election Campaign Act of 1971, as amended ("the Act"), by soliciting and accepting \$805,000 in contributions from the Respondent corporations, which the Complainant alleges are government contractors.¹ Respondent AST generally denies the allegations in the complaint and maintains it had no knowledge that any of the Respondent corporations were government contractors based on its discussions with executives at the Respondent corporations, and based on its own knowledge and past experience. Therefore, AST claims it did not knowingly solicit contributions from government contractors. The complaint also alleges that AST is a "front group" for Alaska Senator Lisa Murkowski, and the Respondent corporations which made contributions to AST obtained federal contracts through "earmarks" from

¹ The Respondent corporations are: Ahtna, Inc., Aleut Corporation, Arctic Slope Regional Corporation, Bering Straits Native Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Alaska Corporation, Cook Inlet Region, Inc., Doyon, Limited, Koniag, Inc., NANA Regional Corporation, Inc., and Sealaska Corporation.

1 Senator Murkowski. AST also denies the allegations in the complaint that it had any
2 connection with Senator Murkowski or her committee.

3 For the reasons more fully discussed below, the Commission has determined to
4 exercise its prosecutorial discretion and dismiss the allegation that Alaskans Standing
5 Together and Barbara Donatelli, in her official capacity as treasurer, violated 2 U.S.C.
6 § 441c(a)(2). *Heckler v. Chaney*, 470 U.S. 821 (1985).

7 **II. FACTUAL AND LEGAL ANALYSIS**

8 **A. Factual Background**

9 AST, an independent-expenditure-only political committee, registered with the
10 Commission on September 23, 2010. According to AST's Statement of Organization, it
11 is a political action committee that supports/opposes more than one Federal candidate and
12 is not a separate segregated fund or party committee. The Respondent corporations are
13 known as Alaska Native Corporations ("ANCs") because they were formed pursuant to
14 the Alaska Native Claims Settlement Act of 1971, a federal law that extinguished
15 aboriginal claims within the State of Alaska. The Commission has opined that ANCs are
16 not "organized by authority of any law of Congress" for purposes of 2 U.S.C. § 441b(a)'s
17 prohibitions. *See* Advisory Opinion 1982-28 (Sealaska). Each Respondent ANC is a
18 parent company that wholly owns a number of subsidiaries, some of which are federal
19 government contractors.

20 **1. Summary of Complaint**

21 The complaint alleges that AST knowingly and willfully solicited and accepted
22 \$805,000 in contributions from government contractors in violation of 2 U.S.C.

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§ 441c(a)(2) for the purpose of funding independent expenditures that supported Lisa Murkowski and opposed Joe Miller's candidacy in Alaska's 2010 U.S. Senate general election. Joe Miller won the Republican nomination for Alaska's 2010 Senate seat in the primary election, but lost the general election to incumbent Republican Senator Lisa Murkowski, who ran as a write-in candidate. The complaint alleges that AST is a "front group" for Senator Murkowski, and the Respondent corporations that made contributions to AST obtained federal contracts through "earmarks" from Senator Murkowski.

2. Alaskans Standing Together's Response

AST's response includes an affidavit from its President, William Anderson, Jr., averring that at the time AST solicited the contributions, its communications with the chief executive officers and other officials of the ANCs were limited to discussions of contributions from them as parent companies, not from their wholly-owned subsidiaries. AST's response further maintains that it was not aware that any of the ANC parent companies were government contractors. Mr. Anderson further averred that based on his experience and familiarity with the operation of the ANCs, the parent companies do not themselves enter into contracts with the federal government; any federal contracting is done by legally-distinct subsidiary companies.

According to its disclosure reports filed with the Commission, and Mr. Anderson's affidavit, AST received the following contributions from the ANCs during the 2010 general election for U.S. Senate in Alaska:

Ahtna, Inc.	\$50,000	9/28/10
Aleut Corporation	\$20,000	10/19/10
Arctic Slope Regional Corporation	\$140,000 \$60,000	9/30/10 10/29/10

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Bering Straits Native Corporation	\$100,000	9/24/10
Calista Corporation	\$15,000 \$35,000	10/5/10 10/15/10
Chugach Alaska Corporation	\$100,000	9/27/10
Cook Inlet Region, Inc.	\$100,000	10/1/10
Doyon, Limited	\$100,000	9/28/10
Koniag, Inc.	\$100,000	9/28/10
NANA Regional Corporation	\$100,000	9/28/10
Sealaska Corporation	\$100,000	9/29/10

AST alleges that it solicited the contributions for the purposes of making independent expenditures. AST further maintains that after the complaint in this matter was filed, it confirmed with the ANCs that the contributing entities were not government contractors, and that they had sufficient revenue derived from subsidiaries that are not federal government contractors to make their contributions. AST also denies the allegations in the complaint that it had any connection with Senator Murkowski or her committee.

B. Legal Analysis

The Act and the Commission's regulations prohibit government contractors from making, directly or indirectly, any contribution or expenditure of money or other thing of value, or to promise expressly or impliedly to make any such contribution or expenditure to any political party, committee or candidate for public office or to any person for any

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1 political purpose. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.2(a) and (b).² A “federal
2 contractor” is defined in terms of the substance of the contract and the source of funds for
3 payment of performance of the contract. 2 U.S.C. § 441c; 11 C.F.R. § 115.1. With
4 respect to the substance of the contract, it includes the rendering of personal services, the
5 furnishing of materials, supplies, or equipment, or the selling of land or buildings.
6 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(a)(1); *see* Advisory Opinion 1984-53 (National
7 Association of Realtors) (lessee of land to federal agency is also considered a government
8 contractor). The prohibition applies if payment to the contractor is to be made in whole
9 or in part from funds appropriated by Congress. 2 U.S.C. § 441c(a)(1);
10 11 C.F.R. § 115.1(a)(2). The prohibition extends for the period of time between the
11 earlier of the commencement of negotiations or when requests for proposals are sent out,
12 and the later of the completion of performance or the termination of negotiations for such
13 contract. 2 U.S.C. § 441c(a)(1); 11 C.F.R. § 115.1(b). The Act and the Commission’s
14 regulations further prohibit any person from knowingly soliciting any contributions from
15 government contractors who are in negotiations for a federal government contract or
16 during the performance of their contract. 2 U.S.C. § 441c(a)(2) and 11 C.F.R. § 115.2(c).
17 When determining whether a committee has received, or that an entity has made,
18 a contribution in violation of 2 U.S.C. § 441c, the Commission looks first to whether the
19 entity met the statutory and regulatory definition of government contractor at the time the
20 contribution was made. *See* MUR 6300 (Gen X Strategies); MUR 5666 (MZM); MUR
21 5645 (Highmark); MUR 4901 (Rust Environmental); and MUR 4297 (Ortho

² The entities alleged to be government contractors in MUR 6403 are all corporations; the constitutionality of 2 U.S.C. § 441c as applied to individuals is currently the subject of litigation. *See Wagner v. FEC*, No. 11-CV-1841 (D. D.C. filed Oct. 19, 2011).

1 Pharmaceutical). In the case of a parent company contributor, if it can demonstrate that it
2 is, in fact, a separate and distinct legal entity from its government contractor subsidiaries,
3 and that it had sufficient funds to make the contributions from non-subsidiary income,
4 then the prohibition on contributions by government contractors would not extend to the
5 parent company. *See* Advisory Opinion 2005-01 (Mississippi Band of Choctaw Indians)
6 (the government contractor status of a tribal corporation, a distinct and separate legal
7 entity from the tribe, does not prohibit the tribe from making contributions to federal
8 candidates, political parties, and political committees as long as the tribe does not use
9 revenues from tribal corporation to make contributions), *citing* Advisory Opinion 1999-
10 32 (Tohono O'odham Nation) (the commercial activity of the Indian tribe's utility
11 authority as a government contractor treated as separate from the tribe and its political
12 activities).

13 Based on the available information, including affidavits from their corporate
14 officers, it appears that Respondents Aleut Corporation, Bering Straits Native
15 Corporation, Bristol Bay Native Corporation, Calista Corporation, Chugach Alaska
16 Corporation, Cook Inlet Region, Inc., Doyon, Ltd., Koniag, Inc., and Sealaska
17 Corporation have sufficiently demonstrated that as parent companies without contracts
18 with the federal government, they are not government contractors, and therefore their
19 contributions to AST were permissible. Although they each have subsidiaries that hold
20 federal contracts, those subsidiaries are separate and distinct legal entities from them, and
21 the parent companies have sufficiently demonstrated that they made their contributions to
22 AST with revenue from sources other than the federal-contract-holding subsidiaries.
23 Therefore, they are not government contractors as defined by the Act and the

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Commission's regulations.³ 2 U.S.C. § 441c; 11 C.F.R. § 115.1; *see* AO 2005-01 (Mississippi Band of Choctaw Indians) *citing* AO 1999-32 (Tohono O'odham Nation). Further, the parent company ANCs' contributions to AST do not violate the Act's prohibition on corporate contributions in connection with federal elections, 2 U.S.C. § 441b(a), because the contributions to AST, an independent-expenditure-only political action committee, were made for the purpose of making independent expenditures. *See Citizens United*, 130 S. Ct. at 913; AO 2010-11 (Commonsense Ten) at 3.

Respondents Arctic Slope, Ahtna, and NANA Regional each have a lease with the federal government to supply either office space or land to a federal agency. Arctic Slope leases office space to Transportation Security Administration ("TSA"), provides various services, supplies, and utilities under that lease agreement, and receives \$28,800 in direct payment from federal government a year. Ahtna also leases office space to the federal government, and provides services, supplies, and utilities under that lease agreement, at the rate of \$9,000 a year. NANA Regional leases land to the U.S. Federal Aviation Administration ("FAA") with rights including maintaining, making alternations to, attaching fixtures, and building structures or fixtures thereon, at the rate of \$400 a year for a term of 19 years. Based on the available information, the federal agencies make the rental payments to these ANCs with funds appropriated by Congress. *See* 11 C.F.R. § 115.1(a)(2).

³ It appears that Koniag and Sealaska's receipt of public grants do not make them government contractors. The public grants that Koniag and Sealaska receive from the federal government appear to be outside of the definition of a federal contract as set forth by the Act and the Commission's regulations. 11 C.F.R. § 115.1(c); *see* AO 1993-12 (Mississippi Band of Choctaw Indians) (federal grant for public service activity, which does not directly benefit the U.S. Government, is not a "contract" as defined by 11 C.F.R. § 115.1; note that the part of the opinion's analysis concerning procurement contracts between tribal enterprises and the federal government is superseded by AO 1999-32 (Tohono O'odham Nation).

1 In AO 1984-53 (National Association of Realtors), the Commission concluded
2 that a lessor of real property to the federal government would be covered by the
3 prohibitions of 2 U.S.C. § 441c and, therefore, would be prohibited from making
4 contributions to federal candidates and committees. 11 C.F.R. § 115.2. The Commission
5 viewed the lease of real property as a contract for "selling any land or buildings" within
6 the meaning of 2 U.S.C. § 441c and 11 C.F.R. § 115.1(a)(1)(iii) because a lease of real
7 property creates an estate in the tenant for a term of years, in effect, representing the sale
8 of an interest in land or buildings, with the rent as the purchase price, and creates a
9 continuing relationship between the lessor and lessee supporting the application of the
10 statutory prohibition to a lease agreement. *See* AO 1984-53. In addition, the
11 Commission noted that lease agreements usually contain explicit contractual provisions
12 regarding repairs, furnishing of utilities, and other matters, and that such provisions can
13 be viewed as contracts for the rendition of personal services or for the furnishing of
14 material, supplies, or equipment. *Id.*; 11 C.F.R. § 115.1(a)(1)(i) and (ii).

15 Arctic Slope's and Ahtna's office space lease agreements with the federal
16 government not only lease the rental space, but include explicit provisions for these
17 parent companies to make repairs, and provide utilities, supplies, and services, such as
18 snow removal and janitorial services, to the federal agency renting the space. NANA
19 Regional's lease agreement is for a term of 19 years, creating a continuing relationship
20 between NANA and the federal agency for a significant length of time.

21 Given these facts, Arctic Slope, Ahtna, and NANA are government contractors

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1 within the meaning of the Act and the Commission's regulations.⁴ See 2 U.S.C.
2 § 441c(a)(1) and 11 C.F.R. § 115.1(a); *see also* AO 1984-53. As federal government
3 contractors, Arctic Slope, Ahtna, and NANA Regional are prohibited from making
4 contributions toward any "political party, committee or candidate for public office or to
5 any person for any political purpose or use." 2 U.S.C. § 441c(a)(1).

6 AST knowingly solicited contributions from Arctic Slope, Ahtna, and NANA
7 Regional, and therefore apparently violated 2 U.S.C. § 441c(a)(2). *See FEC v. John A.*
8 *Dramesi for Congress Comm.*, 640 F. Supp. 985, 986-7 (D.N.J. 1986) ("a 'knowing'
9 standard, as opposed to a 'knowing and willful' one, does not require knowledge that one
10 is violating a law, but merely requires an intent to act.").

11 However, even though Arctic Slope, Ahtna, and NANA Regional appear to meet
12 the definition of government contractors under the Act and the Commission's regulations,
13 and AST apparently knowingly solicited them for contributions, given the unique facts in
14 this matter, the Commission has determined to exercise its prosecutorial discretion and
15 dismiss the allegations that AST solicited and accepted contributions from government
16 contractors. *Heckler v. Chaney*, 470 U.S. 821 (1985). Arctic Slope, Ahtna, and NANA
17 Regional do not ordinarily enter into contracts with the federal government, and the
18 executive officers who made the decision to contribute to AST have averred they were
19 not even aware of the existence of these lease arrangements until after the complaint was

⁴ Ahtna receives a federally-funded grant to oversee a survey near certain Alaska villages for the benefit of Alaskan Natives in the area, however, this grant appears to be outside of the definition of a federal contract as set forth by the Act and the Commission's regulations. 11 C.F.R. § 115.1(c); *see* AO 1993-12 (Mississippi Band of Choctaw Indians).

1 filed.⁵ None of the three companies sought the leases in question. Rather, all three
2 companies were approached by federal agencies to lease certain office space and land
3 space only because the government had no other options in the area, and it appears that
4 the lease arrangements primarily benefit the public, especially NANA Regional's lease
5 for the FAA beacon.⁶ Moreover, the amounts paid by the federal government for the
6 lease agreements are relatively small taking into consideration these ANC's other income
7 and assets.⁷ While Arctic Slope's lease arrangement is the most lucrative, at a rate of
8 \$28,800 a year, this amount represented only 0.0015% of Arctic Slope's gross revenue
9 for 2009.⁸

10 William Anderson averred that although the ANCs were parents of subsidiaries
11 that hold contracts with the federal government, it was AST's understanding, based on
12 Mr. Anderson's knowledge and experience, and communications with the executive
13 officers of the ANCs at the time it solicited contributions, that the parent companies
14 themselves were not the entities that entered into the federal contracts, but were separate
15 legal entities, and that each ANC had revenue from sources other than its government
16 contractor subsidiaries to make the contributions. After receiving the complaint, AST
17 confirmed its understanding with the ANCs. Most of the ANCs that contributed to AST
18 were not government contractors as defined by the Act and the Commission's

⁵ Arctic Slope Response at 2-3; Kristin Mellinger Affidavit at ¶¶ 6,7; Clay Contrades Affidavit at ¶¶ 2,4. Ahtna and NANA Joint Response at 3-5; Roy Tansy, Jr., Affidavit at ¶¶ 4,5; Marie N. Greene Affidavit at ¶¶ 3,4; and David Fehrenbach Affidavit at ¶ 4.

⁶ Arctic Slope Response at 2-3; Kristin Mellinger Affidavit at ¶ 7; Clay Contrades Affidavit at ¶¶ 2, 4. Ahtna and NANA Joint Response at 3-5; Jeffrey Nelson Affidavit at ¶ 3; Kathryn Martin Affidavit at ¶¶ 5, 6.

⁷ Arctic Slope Response at 3; Kristin Mellinger Affidavit at ¶ 7. Ahtna and NANA Response at 3-5; Jeffrey Nelson Affidavit at ¶ 4; Kevin Thomas Affidavit at ¶¶ 3,4; David Fehrenbach Affidavit at ¶¶ 7,8.

⁸ Arctic Slope Response at 3; Kristin Mellinger Affidavit at ¶ 7.

1 regulations, and there is no available information indicating that AST knew that Arctic
2 Slope, Ahtna, or NANA Regional had lease agreements with the federal government, or
3 that these ANCs advised AST of their existence at the time the contributions were made.

4 There is no available information to support the complaint's general allegations
5 that AST is a "front group" for Senator Murkowski or that the Respondent ANCs'
6 contracts were the result of "earmarks" from her. Further, the screenshot of AST's
7 "About Us" page from its website, which Complainant attaches to the complaint,
8 specifically states AST "is not affiliated in any way with the Lisa Murkowski Campaign."
9 According to the disclosure reports the Murkowski Committee filed with the
10 Commission, that committee did not receive any contributions from AST. Moreover,
11 there is no available information indicating that AST's expenditures in connection with
12 the 2010 general election for Alaska's Senate seat were coordinated with Senator
13 Murkowski or her committee.

14 Therefore, the Commission has determined to exercise its prosecutorial discretion
15 and dismiss the allegation that Alaskans Standing Together and Barbara Donatelli, in her
16 official capacity as treasurer, violated 2 U.S.C. § 441c(a)(2). *Heckler v. Chaney*, 470
17 U.S. 821 (1985).

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